1975

Merrill B. Anderson, Dorothy M. Anderson, and Ralph Bitner Morris v. Capitol Thrift and Loan Co, James B. Mason, and Mid-Valley Investment: Unknown

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

MERRILL B. ANDERSON, DOROTHY M. ANDERSON, and RALPH BITNER MORRIS,

Plaintiffs-Appellants,

- vs -

CAPITAL THRIFT & LOAN CO., JAMES B. MASON, as Trustee, and MID-VALLEY INVESTMENT,

Defendants-Respondents.

Case No. 14144

- -

Answer to Cross-Appeal from the Third District Court of Salt Lake County, State of Utah, Honorable Stewart M. Hanson, Sr., District Judge, presiding at trial of Defendant's counterclaims.

Answering Brief of Plaintiffs-Appellants to Defendant-Respondent Mid-Valley Investment's Cross Appeal.

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ABBREVIATIONS

For the purpose of this Brief, when referring to the transcript, the abbreviation "Tr." followed by page and line will be used. When referring to the record brought up from the Third District Court, the abbreviation "R" followed by the page number will be used. All other documents will be referred to by full name.

STATEMENT OF THE NATURE OF THE CASE

This Brief will deal solely with answering the Cross-Appeal of the Defendant-Respondent Mid-Valley Investment taken from the denial of their counterclaims for bond forfeiture and unlawful detainer by Judge Stewart M. Hanson, Sr. of the Third District Court, after trial of the same.

DISPOSITION OF THE LOWER COURT

After a trial on the counterclaims of Defendants-Respondents for unlawful detainer and bond forfeiture, the Third District Court, Judge Stewart M. Hanson, Sr. presiding, dismissed the counterclaims.

RELIEF SOUGHT ON APPEAL

To have the decision of the trial court affirmed, with respect to Defendants-Respondents' counterclaims.

STATEMENT OF FACTS

This statement will be limited to those facts concerning the limited issues involved in the Cross-Appeal of the Defendant-Respondent Mid-Valley Investment. The trial of the Defendants-Respondents' counterclaims came on for hearing on the 10th day of April, 1975, before Judge Stewart M. Hanson, Sr. in the Third District Court. (See R. page 109.) The original counterclaim alleged unlawful detainer on both of the properties in dispute, i.e., the residence on 12th Avenue, and the apartment house on 11th East (see R. pages 21-23), and for forfeiture of plaintiffs' bond in the amount of $10.00 for each day from February 10, 1975 to the date of entry of judgment, together with attorney's fees. (R. page 23) However, the trial court denied the counterclaims. (See R. page 145, Conclusions of Law and Judgment; R. page 113) The counterclaims arose as a result of Plaintiffs-Appellants' action to set aside an alleged trustee's sale of their property purportedly held on January 16, 1975. (See Complaint R. pages 1-4.) The issue of setting aside the alleged sale was determined by the trial court upon a Motion for Summary Judgment by the Defendant-Respondent Mid-Valley Investment. (See R. page 28.) The hearing on the same was heard on March 27, 1975; however, the decision of the court was not had until the 10th of April, 1975. (R. page 108.)

Between the alleged sale of the property, January 16, 1975, and

the decision of the District Court affirming the same on April 10, 1975, the following events took place.

A) Plaintiffs-Appellants signed an agreement to remove themselves from the property on 11th East by January 31, 1975. (Exhibit 1-d.)

B) On February 1st, Mid-Valley changed locks on doors and would only allow entry by Plaintiffs-Appellants under their supervision. (Tr. page 179, lines 20-21; Tr. page 199, lines 2-12.)

C) Mid-Valley allowed an extension of the time for Plaintiffs-Appellants to remove their property from the premises, first until February 7, and then until February 10. (Tr. page 183, lines 7-16; Tr. page 180, lines 1-10.)

D) Plaintiffs-Appellants then obtained a restraining order, with Mid-Valley's approval, to allow them to use the office in the premises and prevent Mid-Valley from removing the furniture. (R. page 11; Tr. page 180, lines 10-14.)

E) Plaintiffs-Appellants had physical possession of the premises at no time after January 31, 1975. (Tr. page 196, lines 22-27.)

F) A hearing on the restraining order was had on February 18, 1975 in the District Court, at which time the restraining order was affirmed provided Plaintiffs-Appellants posted a $7,500.00 bond. (R. pages 13-14.)

G) Plaintiffs-Appellants obtained the bond, but elected to remove their furniture on March 5, 1975. (Tr. page 180, lines 22-28.)

ARGUMENT ON DEFENDANTS-RESPONDENTS' CROSS-APPEAL FROM DENIAL OF ITS COUNTERCLAIMS

POINT I

PLAINTIFFS-APPELLANTS WERE NOT IN UNLAWFUL DETAINER OF THE 11th EAST PROPERTY.

The unlawful detainer sections of the Utah Code Annotated, 78-36-3 et sequal, talk in terms of a "tenant of real property . . . " (emphasis added). Therefore, and necessarily, a landlord-tenant relationship has to exist before the unlawful detainer statutes are applicable. This Court said as much in Holladay Coal Co. v. Kirker, 20 U. 192, 57 P. 882, when it said:

> Action of unlawful detainer presupposes absence of fraud and force, as well as existence of relation of landlord and tenant.

Also, any party claiming under the unlawful detainer statutes are held to a strict compliance.

> Unlawful detainer statutes provide severe remedy and must be strictly complied with before cause of action thereunder may be maintained. Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P. 2d 468 at page 470.

And the cause of action has to arise at the time the action is commenced.

> Whether cause of action in unlawful detainer exists is to be determined at time action is commenced. Ibid at page 470.

It is clear from the record that Defendants-Respondents commenced their action for counterclaims and unlawful detainer on March 4, 1975. (R. page 19.) At this time, the Plaintiffs-Appellants were in the process of removing their furniture and were all out by about March 5, 1975. (Tr. page 180, line 28.) Accordingly, there could not have been any unlawful detainer at the time the action was commenced, as it was the Mid-Valley Investment's agent himself who was testifying above that the Plaintiffs-Appellants had removed their furniture and he found the key in the mailbox, "and it was about the 5th of March". Plaintiffs-Appellants' testimony was that they had removed the last of February they thought. (Tr. page 198, line 4.) Accordingly, on this point alone, the claim for unlawful detainer must fail. If Mid-Valley found the key in the mail-box about the 5th of March, it is an easy presumption for the trial court to make that they were out on or before the 4th. There is no clear and convincing evidence to the contrary.

Defendants-Respondents claim that such a relationship did exist between Mid-Valley Investment and the Plaintiffs-Appellants. However, the trial court did not so find, and in its Conclusions of Law, Number 2, held: "That during the period in question, ownership and title were unresolved; the plaintiffs herein held possession, and at least constructive possession in an honest belief that they had ownership and were entitled to possession". (R. page 111.) Clearly then, the trial court did not accept the argument of the Defendants-Respondents.

In this jurisdiction, it is clearly the law that the findings of the trial court will not be disturbed except in clearly justifiable cases. The following cases substantiate this:

> Supreme Court will not upset findings of trial court unless evidence clearly preponderates to the contrary. Utah 1975, Zions First National Bank v. First Security Bank of Utah, N.A., 534 P.2d 900.
>
> Even in equity cases, trial court's findings and judgment will not be disturbed on appeal unless evidence clearly preponderates against them and a manifest injustice or inequity is wrought. (Per Crockett, J., with one judge concurring and two judges concurring in result.) Utah 1974, McCullough v. Wasserback, 518 P.2d 691, 30 Utah 2d 398.
>
> Supreme Court will not disturb findings with respect to an equitable plea unless they are clearly against weight of evidence. Utah 1972, Achter v. Maw, 493 P.2d 989, 27 Utah 2d 149.
>
> Supreme Court may review facts in equity cases but makes allowance for advantaged position of trial judge and does not disturb his findings and judgment merely because it might have viewed matter differently, unless evidence clearly preponderates against them or he has abused discretion or misapplied law. Utah 1970, Corbet v. Corbet, 472 P.2d 430, 24 Utah 2d 387.
>
> In equitable proceeding, Supreme Court may review findings but should not disturb them unless they are clearly against weight of evidence. Utah 1969, Chevron Oil Co. v. Beaver County, 449 P.2d 989, 22 Utah 2d 143.
>
> Supreme Court would sustain findings and determination made by trial court in equity case unless evidence clearly preponderated against them or trial court misapplied rules of law. Utah 1963, Weggeland v. Ujifusa, 384 P.2d 590, 14 Utah 2d 364.

It is also the rule of law in this jurisdiction that the findings of the trial court are presumed correct, and the burden of proving error falls upon the party alleging it.

> In reviewing proceeding in equity seeking determination as to which of two mortgages takes precedence, deference is given to prerogative of trial court to make findings and judgment, and trial court is indulged with same presumptions of verity accorded in other equitable proceedings. Utah 1970, Kemp v. Zions First Nat. Bank, 470 P.2d 390, 24 Utah 2d 288.

> Although action to avoid deeds is one in equity upon which reviewing court has both the prerogative and the duty to review and weigh the evidence, and to determine the facts, trial court's findings and judgment are presumed correct, and appellant has burden to show they were in error; and where the evidence is in conflict, reviewing court will not upset trial court's findings merely because reviewing court may have viewed the matter differently, but will do so only if evidence clearly preponderates against the trial court's findings and judgment. Utah 1972, Del Porto v. Nicolo, 495 P.2d 811, 27 Utah 2d 286.

Therefore, it would appear from the foregoing that unless the lower court clearly made a serious and blatant error in its Findings of Fact and Conclusions of Law, completely unsubstantiated by the evidence or law of the case — this Court must uphold the decision of the trial court.

Plaintiffs-Appellants respectfully submit that the evidence does substantiate the findings and decision of the trial court and an examination of it will so prove.

The Defendants-Respondents make much of exhibit 1-d, purporting to be the agreement which created the landlord-tenant relationship, and thus paved the way for the unlawful detainer claim. It should be noted that Defendants-Respondents have abandoned their claim to unlawful detainer on the home on 12th Avenue, and limit their claim to the apartment house on 11th East.

The language of exhibit 1-d, pertinant to the 11th East property and upon which Defendants-Respondents rely to establish this crucial landlord-tenant relationship, is as follows:

> Andersons will remain in possession of apartment (246 - 11th East) until January 31, 1975 at midnight — or before at option of Andersons. No rent to be charged.

Plaintiffs-Appellants respectfully urge that there is nothing in the language above which creates a landlord-tenant relationship for the letting of property. Nowhere do the terms "landlord" or "tenant" appear. Nowhere does there appear any rental figure. In fact, it simply cannot be called a rental agreement at all. Also, according to the testimony before the trial court, there was no prior discussion about the terms "landlord" and "tenant" for the transcript (Tr. page 192, lines 6-22) discloses the following:

> Q (Mr. Dodd): And was there any discussion had prior to the signing of that agreement concerning the term "landlord"?
>
> A (Mr. Anderson): No, sir; not as such, no.

Q (Mr. Dodd): I see. When you signed that agreement does the agreement contain the term "landlord"?

Mr. Mabey: Objection, your Honor. The agreement speaks for itself again.

The Court: It does. I have got it right in front of me.

Mr. Dodd: O.K., very good.

Q (Mr. Dodd): Mr. Anderson, in the discussion that took place prior to the signing of that document was there any discussion with regard to the term "tenants"?

A (Mr. Anderson): No. That word did not come up at all.

Q (Mr. Dodd): And at the time you signed that document did you understand by signing it you would become a tenant?

A (Mr. Anderson): No, sir; not as such.

And with regard to what the document really was, the following testimony was before the trial court:

A (Mr. Anderson): This agreement was signed to buy us time to get out and find a place for my family to live. It was our feeling, and we were given to understand, if we had not signed this we could have been put out on the street that evening. So in order to still have my family, my wife and two children, and this was buying time to arrange for an orderly time to find a suitable place to live and make these arrangements. (At Tr. 193, lines 15-21.)

Prior to the foregoing testimony, Mr. Anderson had testified: "We had always taken the stand that the original sale was improper and

illegal and that because of that we were the true legal owners of the property". (See Tr. page 193, line 1.) Further, Mrs. Anderson testified that her testimony would be the same if asked the identical questions. (See Tr. page 196, lines 9-12.)

From the foregoing, it is clear that at least the Andersons never looked upon the document as a rental agreement, and if the trial court chose to believe them, then there was ample evidence for the court to find that it was not a rental agreement, and did not create a landlord-tenant relationship with regard to the property on 11th East. And there being no overwhelming evidence to the contrary, this Court, according to its own decisions enumerated above, must affirm the trial court's findings.

In order for the Defendants-Respondents to prevail, they would have to establish that there was clear and convincing evidence that the requirements of Section 78-36-3(1) had been met, i.e.

1) That a landlord-tenant relationship was established.

2) That rent for a fixed term was established.

3) That the property was "let" to the Andersons.

4) That exhibit 1-d was a rental agreement.

This the Defendants-Respondents have failed to do and therefore they cannot prevail.

In addition to the foregoing, and even if this Court could, by some wild stretch of its imagination, call exhibit 1-d a rental agreement,

and if this Court found by some equally wild stretch of its imagination that a landlord-tenant relationship existed — the Defendants-Respondents still could not prevail.

Section 78-36-3(1) of the Utah Code Annotated, upon which Defendants-Respondents rely, specifically states: "When he (the tenant) continues in possession, in person or by subtenant . . ." In the case at bar, there is no testimony that Plaintiffs-Appellants remained in possession beyond the date of January 31, 1975, which was the date allegedly agreed upon in the purported agreement. The testimony before the trial court was: (See Tr. page 196, lines 22-27.)

> Q (Mr. Dodd): Let me rephrase it. When did you last have physical possession that property? (11th East)
>
> A (Mrs. Anderson): On the last day of January.
>
> Q (Mr. Dodd): And were you permitted to go into that property after that?
>
> A (Mrs. Anderson): Never.

And under cross-examination: (See Tr. page 199, lines 2-12.)

> A (Mrs. Anderson): No. The only way they would make the apartment available to me if I had a client come in, Mr. Broadbent would open up the door and I would conduct business, and he did. I never did have access to that place after the last of January.
>
> Q. (Mr. Mabey): Isn't it true, Mrs. Anderson, that at the time you finally decided to remove your belongings Mr. Broadbent allowed you to remove them subject to your own prudence and your own convenience?

A (Mrs. Anderson): No, that isn't true. He unlocked that but only gave me a key if I would take out so many things, but he would never give me a key so I would have access.

Even Mid-Valley's own agent testified to the trial court that "In behalf of Mid-Valley, I called a locksmith and had those locks changed on all of the units". (11th East property) (Tr. page 179, lines 20-21.) And under cross-examination, Mid-Valley's agent testified (Tr. page 183-184, lines 17-30 and 1-11.) as follows:

Q. Isn't it true that the Andersons never really did have physical possession of the property on 11th Avenue?

A. They were not living there.

Q. Were they?

A. They were not living there.

Q. I see. And even after January 31st, they never did have physical possession in that sense, did they?

Mr. Mabey: Objection, your Honor, to ask the witness to make a legal determination as far as possession is concerned.

The Court: All he asked him was physical.

Mr. Mabey: There is no legal question to determine, so I won't -- I have no objection.

The Court: He means were they living there

Mr. Dodd: I think Mr. Mabey is empowering me with some ability far greater than I really have.

The Court: You will both have to talk a little louder.

Q (Mr. Dodd): All I am asking is did the Andersons have physical possession of the property on 11th East?

A. They were not living there. They had their things stored there and removed them.

Q. O.K. Now, what was the date you changed the locks on the door?

A. February 1st.

Hence, it was clear to the trial court that the Plaintiffs-Appellants never physically possessed the property on 11th East after January 31, 1975, and that Defendants-Respondents actually changed the locks on February 1, 1975, effectively denying them free possession of the premises. Therefore, the claim of Defendants-Respondents must rest upon the fact that some of Plaintiffs-Appellants' property was left in the premises. In this claim they cannot prevail as the section of the statute upon which they rely specifically states "a tenant . . . when he continues in possession, in person or by subtenant . . . " is guilty of an unlawful detainer. (78-36-3(1) Utah Code Annotated.) Thus, in order for Defendants-Respondents to prevail on their theory, the belongings left on the premises would have to be called "persons", "tenants" or "subtenants".

The next argument the Defendants-Respondents raise concerns the findings of the trial court that their notice "was defective", is

erroneous. (Defendants-Respondents' Brief, page 38.) Of course, if this Court finds that no landlord-tenant relationship existed, then this question would not have to be treated; however, it must be kept in mind that the trial court had before it not only the unlawful detainer claim on the property at 11th East, but also a similar claim on the home on 12th Avenue. The only evidence before the trial court was exhibit 2-d, purportedly a "Three Day Notice to Pay Rent or Vacate". However, this was served upon Mrs. Anderson only (Tr. page 177, line 13), and by its own terms refers strictly to the 12th Avenue property. Clearly, under this Court's holding in Perkins v. Spencer, 121 U. 468, 243 P. 2d 446, that:

> An action for unlawful detainer cannot be maintained against a tenant to whom no copy of the notice required by the statute was mailed, although a copy was left with his wife.

That the trial court was absolutely correct in holding that the service was inadequate, was and is beyond dispute. With regard to the 11th East property, the evidence before the trial court was that Defendants-Respondents extended the occupancy of the Plaintiffs-Appellants voluntarily, for under cross-examination, the following was given:

> Q (Mr. Dodd): Mr. Broadbent, you have testified that Mr. Anderson phoned you on or about the 31st of January requesting an extension of time, but you never did say whether you granted the extension. Did you in fact grant an extension of time?
>
> A. Yes, I did.

Q. Until when, the 10th of February?

A. No. He asked me, he said it would take him about one week and I said that would be fine, would he have it out then, and he said, "Yes, I am sure we will be out by then". This was on the 31st. (Tr. page 183, lines 7-16.)

A further extension was then voluntarily given until Defendants-Respondents could be served with a restraining order to which they agreed. (Tr. page 180, lines 1-10.)

By the 10th of February, the Defendants-Respondents had been restrained by the Third District Court (R. page 11) from removing Plaintiffs-Appellants' property from the premises, and from denying them reasonable use of the office. The hearing on the restraining order was had on the 18th of February, 1975, and made permanent the order provided that Plaintiffs-Appellants posted a $7,500.00 bond. (R. page 13-14.) Rather than post the bond, Plaintiffs-Appellants removed their property approximately two weeks later. (Tr. page 180, lines 22-28.)

Thus, the Plaintiffs-Appellants respectfully point out that until February 10, they had the express permission of the Mid-Valley Investment Company to remain on the premises. Thereafter, it was under judicial restraint until Plaintiffs-Appellants removed their property in the first week of March. There is no evidence that between February 18 and March 5, the Defendants-Respondents took any action to have the bond filed or otherwise. Thus, Plaintiffs-Appellants have not in any

respect unlawfully restrained Mid-Valley Investment from use of the premises. This is especially true where the record shows that this property had five apartments in it (Tr. page 185, lines 10-11), and the only area claimed to have the furniture of Plaintiffs-Appellants in it was a 9' x 11' office (Tr. page 197, lines 10-18), and a breakfast room adjacent. (Tr. page 200, lines 1-8.) This represents a very small portion of the five-plex apartment house.

It should also be pointed out that the order of the trial court which heard the argument on the question of the restraining order, never fixed a date by which the bond should be submitted. This order was prepared by Defendants-Respondents' attorney. (R. pages 13-14.) It has never been reversed or superseded by a subsequent order of any court, and Defendants-Respondents have never requested a determination of the same. They simply let the matter slide and took no affirmative action.

On page 40 of their Brief, the Defendants-Respondents assert, under Section C, that the amended Conclusions of Law, Numbers 1 and 2, are erroneous. To support this claim, they cite Forrester v. Cook, 77 Utah 137, 292 P.206 (1930) and Tanner v. Lowler, 6 Utah 2d 84, 305 P.2d 882, rehearing granted, 6 Utah 2d 268, 311 P.2d 791 (1957). Both of these cases are readily distinguishable and not applicable to the case at bar. In Cook, supra, there was a definite buy-sell agreement between the parties which amounted to a real estate contract. Plaintiff sued for return of the

premises on breach of the contract payment schedule. Defendant was in possession. In our case, there was no real estate contract, no payment schedule and certainly nobody in possession. In Tanner, supra, the facts are nowhere near analogous to the case at bar. The issue in the case was one concerning whether or not the plaintiff had a right to redeem, and whether he had, in fact, redeemed by giving the defendant Reichert $9,078.81. Reichert for his part, was an intervener in the case and had obtained an assignment of the Sheriff's Certificate of Sale from the foreclosing mortgagee. At the time he took the assignment, he knew that plaintiff wanted to redeem, but the Court held that because Reichert, knowing Tanner wanted to redeem, still only took an assignment of the Sheriff's Certificate of Sale, he was bound by his decision and Tanner's redemption was valid. This was the principal issue of the case; however, the Court had to deal with the problem of unlawful detainer, as the Lowlers, as Reichert's tenants, had been in possession of the premises and refused to move. Unfortunately, the Lowlers were poor and judgment-proof as this Court indicated at page 887 of 305 P.2d 882:

> Here it is evident that the money judgment against the Lowlers is not collectable.

Thus, because the tenants in possession were judgment-proof, the Court passed along the judgment to Reichert who was, in fact, the antagonist. The reasoning of the Court was as follows:

> This presents the problem of whether a person, not actually occupying the premises and who does not claim as tenant of the person bringing the action, intervenes in the action and asserts ownership of the property and both he and the actual occupant assert the right of possession in the actual occupant only as such intervener's tenant, is guilty of unlawful detainer of the property where the court in such action finally decides that the intervener's claim to such property is invalid. (Page 886)

It should also be noted that in making its ruling, this Court limited its ruling to "in this kind of case" (emphasis added) (See Defendants-Respondents' Brief, page 41.) From the case itself, we can observe that what "in this kind of case" means is as follows:

1) Where there is a tenant in possession.

2) Where tenant refuses to move after notice.

3) Where there is an intervener who bolsters the position of the tenant and through whom the tenant claims the right to possession.

Obviously, none of the above measures apply in the case at bar where there was no tenant in possession, no refusal to move out, and where premises involved only two rooms of a five-plex apartment house. Also, Plaintiffs-Appellants were denied the right to move their furniture by Mid-Valley changing the locks.

Items "D" and "E" of the Defendants-Respondents' Brief, at page 42, are only applicable in cases of unlawful detainer. The Court need not get to these questions of "Fair Rental" value and "Damages" as there was no unlawful detainer and the requirements of Section 78-36-3(1) have

not been met. However, since Defendants-Respondents have raised these issues, they must be addressed.

The testimony before the trial court was that there was no renter for the premises on February 1, 1975 (Tr. page 186, lines 4-9), and that the first bona-fide offer to rent was on the 15th of March. (Tr. page 186, lines 10-13.) There was obviously no rental payment under the terms of exhibit 1-d (the purported rental agreement). Hence, there is no accurate figure to base the rental value on for the time period covered by the alleged unlawful detainer. The Mid-Valley Investment Company agent did say he rented the premises later for $310.00 per month. (Tr. page 181, lines 17-18.) But there is nothing to indicate what it was that was rented for $310.00 per month. There is no description of the rented premises. Plaintiffs-Appellants testified that their property was in a small 9' x 11' office and adjoining kichenette. Is the Court to believe that this is what was rented for $310.00 per month? Or should it be some prorated share of the same? Inasmuch as there is no clear and convincing evidence as to the real, fair rental value of the property, and no adequate description of the premises rented, the Defendants-Respondents have failed to carry their burden on this point.

On the question of damages, the Defendants-Respondents are obviously asking for too much. Even if we allow the exhibit 1-d, there is still the clear testimony of Mr. Broadbent that he willingly allowed an extension of the same until the 10th of February, 1975. (Tr. 178, line 28;

Tr. page 180, lines 1-9) The property was under judicial restraint by the 10th of February. (R. page 11; Tr. page 180, lines 12-13.) The judicial restraint was affirmed on the 18th of February, 1975. (R. page 13.) The judicial restraint has never been lifted; however, the Plaintiffs-Appellants removed their property in the first week in March. At any time, up and until the removal of their property, Plaintiffs-Appellants could have posted the required bond to bind the Defendants-Respondents from removing their property until trial, but they elected not to. Also, there was no affirmative action of the Defendants-Respondents to get the bond posted or to remove the property.

Clearly then, the Defendants-Respondents, of their own volition, extended the time until they were served with the judicial restraint. Thereafter, they never took any action until Plaintiffs-Appellants removed the property. Can this be said to be the kind of unlawful possession required to come within the perview of 78-36-3(1)? Also, even if it was, the days freely allowed by Defendants-Respondents could not be included, nor can the days of the judicial restraint, which was never lifted. Therefore, the Defendants-Respondents can take nothing.

POINT II

AMENDED CONCLUSIONS OF LAW NO. 7 IS NOT ERRONEOUS AND THE ANDERSONS SHOULD NOT FORFEIT THEIR $300.00 BOND, NOR ARE DEFENDANTS-RESPONDENTS ENTITLED TO DAMAGES.

Firstly, the restraining order of February 10, 1975 did not enjoin the Defendants-Respondents from "occupying the 11th East commercial property" as alleged at page 43 of Defendants-Respondents' Brief. The document itself clearly states only that the Defendants-Respondents could not:

A) Remove any of the Plaintiffs-Appellants' property,

B) Deny the Plaintiffs-Appellants use of the office in the premises.

The remainder of the property was in no way covered by the order.

Secondly, the statement on the same page that "this order remained in effect until February 18, 1975" is a conclusion and not a statement of fact. The order of February 18, 1975 reaffirms the order of February 10, 1975 and simply adds the condition that Plaintiffs-Appellants had to put up a $7,500.00 bond. This they obtained (Tr. page 198, lines 17-20.), but elected to remove their property instead. However, both orders of the court were legal and proper and binding upon the Defendants-Respondents. It should be noted that although the orders of the court were issued, the Defendants-Respondents never complied with them. Plaintiffs-Appellants were never given the use of the office in the building (Tr. page 196, lines 20-27) unless they phoned first and then Mr. Broadbent was present while Plaintiffs-Appellants used the office (Tr. page 199, lines 2-6). This cannot be construed

as complying with the order of the court. Plaintiffs-Appellants respectfully urge that one cannot complain of a court order that one never complied with.

With respect to Rule 65A(c) of the Utah Rules of Civil Procedure, and the claim that Mid-Valley Investment Company is entitled to bond forfeiture under the same (Defendants-Respondents' Brief, page 43), there is no credulity. It was not until April 10, 1975 that the issue of Defendants-Respondents' Summary Judgment was finally determined. Up and until that time, the legitimacy of the alleged trustee's sale was in doubt. Hence, at the time the temporary restraining order of February 10th was obtained, the ownership of the property was in question. Also, it must be remembered that at this time, Defendants-Respondents had changed the locks on the doors and had refused Plaintiffs-Appellants use of the office on the freedom to remove their furniture at will. Thus, the question is, where the ownership of the property is in dispute and controlled by one party not formerly the owner, is it wrong for the District Court to issue a temporary restraining order allowing temporary use of the premises to the former owner?

The language of Rule 65A(c) talks of the restraint being "wrongfully" ordered. That is, the issuing court had no authority to grant it in the first place. The Coggins case cited in Defendants-Respondents' Brief at page 44 is exactly on point. The Coggins v. Wright, 22 Arizona

App. 217, 526 P.2d 741, case dealt with the following fact situation:

> On June 15, 1949, appellant obtained a judgment against appellees in the Maricopa County Superior Court. On June 7, 1954, appellant filed an affidavit of renewal on said judgment pursuant to A.R.S. Section 12-1612. Thereafter, appellant filed additional affidavits of renewal of the said judgment on May 26, 1959, April 23, 1964 and May 12, 1969.
>
> In September of 1969 appellant secured a general writ of execution to issue on said judgment and, over one year later, on December 4, 1970, delivered it to the Maricopa County Sheriff with instructions to levy first against personal property.
>
> On December 9, 1970, the Sheriff seized appellees' 1965 Chevrolet automobile. Appellees' attorney advised the Sheriff that the writ was invalid. The Sheriff disagreed and proceeded with the sale which took place on December 30, 1970, at which time the automobile was sold for $200.00.
>
> Prior to the sale appellant offered to release the vehicle from the execution if the appellees would waive their rights to sue for unlawful execution. Appellees refused this offer.
>
> Before the sale by the Sheriff appellees filed a motion in superior court to quash the writ of execution but took no steps to stay the sale. On January 22, 1971, the writ of execution was quashed by the court. Appellant filed an appeal from the order quashing the writ but later abandoned the appeal.
>
> Appellees then brought this action for wrongful execution against the appellant and the Sheriff. (At page 742) (emphasis added)

The court then went on to hold that:

> Appellees maintain that the court's order quashing the writ of execution was conclusive on the wrongfulness and we agree. (at page 742)

Therefore, in the Coggins case, supra, upon which Defendants-Respondents rely, the issuing court itself quashed the writ as being wrongfully issued. In the case at bar there is no such quash nor any motion to do such by the Defendants-Respondents. Indeed, after a full hearing, the order was affirmed; therefore, how could it have been wrongfully issued? The record is clear that the same court some two months later granted Defendants-Respondents' Motion for Summary Judgment; however, at the time of issuance, there was nothing wrongful about the order and the issuing court acted fully within its power. At the trial of this issue, the trial court refused to declare that the order was issued wrongfully, and the Defendants-Respondents have not presented any evidence to demonstrate obvious error; therefore, the finding of the trial court is conclusive of the matter. (See R. page 112, Conclusion No. 7.)

As pointed out above, Rule 65A(c) contains no language concerning forfeiture. Therefore, what the Defendants-Respondents are asking cannot be allowed. However, if this Court did find that the restraining order was wrongfully issued, then the rule does allow "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained". (65A(c) This language expressly states that the "costs" and "damages" have to be "incurred" or "suffered". At the trial, there was no evidence

presented with regards to "costs" or "damages" "incurred" or "suffered". Having presented none, the Defendants-Respondents have waived their right to the same. The affidavit of Attorney Ralph Mabey (R. page 44) cannot constitute evidence in this case. If Rule 65A(c) is to be applied at all, it must be for the benefit of the injured party, not the attorney for the injured party. While Mr. Mabey's affidavit no doubt constitutes an accounting of his time, it is not evidence. There was no evidence that it was presented for payment, or that it has been paid, i.e., that Mid-Valley has been damaged that much. Therefore, Defendants-Respondents cannot recover for lack of proof of their damages and costs sustained, if any.

In addition, in the Coggins case, supra, upon which the Defendants-Respondents rely, the attorney's fees were awarded for the time used by the attorney to get the writ quashed. In the case at bar, it was never quashed, neither at the hearing on the 18th of February nor at the trial on April 10th, nor was any motion to quash raised by Defendants-Respondents. As in the Coggins case, supra, Plaintiffs-Appellants respectfully maintain that the fact it was not quashed is conclusive of its proper and rightful issuance.

The law on damages is quite clear:

> Generally speaking, the party who would lose if no evidence were presented as to an issue regarding damages is charged with the burden of proving that issue. As a rule, the burden of proof is upon

> the plaintiff to show the fact and extent of the injury and to show the amount and value of his damages, whether the action is for a breach of contract or for tort. In a damages action, where issue is taken the plaintiff must show not only that he has suffered damage because of the wrongful act complained of, but also that it would not have been incurred except for the wrongful act of the defendant, if he would recover more than nominal damages. 22 Am. Jur. 2d Damages Section 296 page 392.

The record of the trial court is devoid of any evidence on this question of damages, and especially the claim for attorney's fees. Mr. Mabey's affidavit was not tendered at the trial, nor did he or his client present any oral testimony. This affidavit was an exhibit attached to his Memorandum of Law supporting its Motion for Summary Judgment and Bond Forfeiture (R. page 44). However, the lower court refused to hear the matter upon motion and reserved it for the time of trial. (R. page 108.) Thus, at the trial the affidavit should have been presented and/or accompanied by oral testimony. In this manner, it could have been cross-examined; however, under the conditions of this case, it would be inadmissible as hearsay. Also, Plaintiffs-Appellants have had no chance for cross examination of the same. It is submitted that under the general law outlined below, the Defendants-Respondents have waived their right to damages by not presenting any at the time of trial:

> The admissibility of evidence to establish or disprove the elements and amount of damage or the measure of recovery is governed by the rules and principles governing the admissibility of evidence

in civil actions. 22 Am. Jur. 2d Section 303 page 402.

It is submitted that the affidavit is inadmissible under the law the way it has been presented in this case.

CONCLUSION

In conclusion then, the claim by Mid-Valley Investment for unlawful detainer with accompanying damages must fail for the following reasons:

A) There has been no landlord-tenant relationship established.

B) The terms of the statute 78-36-3(1) have not been strictly met.

C) There was no unlawful detainer because Plaintiffs-Appellants were never in possession.

D) At the time the counterclaim for unlawful detainer was filed, the Plaintiffs-Appellants had either moved out or were in the process of so doing.

E) The Defendants-Respondents agreed and permitted Plaintiffs-Appellants to leave their furniture on the premises.

The claim for forfeiture of the $300.00 bond must fail because:

A) Rule 65A (c) does not apply to the case at bar.

B) The restraining order was properly and rightly issued and has never been rescinded or quashed.

C) The Defendants-Respondents have not presented any evidence with regard to damages and costs incurred and, therefore, forfeited the same.

Respectfully submitted,

Graham Dodd

GRAHAM DODD
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 1975, I served two copies each of the foregoing Brief by delivering same to Ralph R. Mabey, Attorney for Defendant-Respondent Mid-Valley Investment, 225 South 200 East, Salt Lake City, Utah and Robert D. Merrill, Attorney for Defendants-Respondents Capital Thrift and Loan Company and James B. Mason, as Trustee, 141 East First South, Salt Lake City, Utah.

Graham Dodd